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14 and Oppenheimer & Co., Inc.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

13 IN RE STEC, INC. SECURITIES
14 LITIGATION

15 This Document Relates To:
16 ALL ACTIONS

Lead Case No. 8:09-cv-01304-JVS (MLG)

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**REPLY MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF UNDERWRITER
DEFENDANTS' MOTION TO
DISMISS THE SECOND
CONSOLIDATED AMENDED
COMPLAINT**

20 Date: June 13, 2011
21 Time: 1:30 p.m.
22 Court: 10C
23 Judge: Hon. James V. Selna

1 **I. INTRODUCTION**

2 In its Opposition to the Underwriter Defendants' Motion to Dismiss,
3 Plaintiff concedes that it lacks standing to pursue any claims under Section
4 12(a)(2) of the Securities Act of 1933. (Opp. at 2, n.1.) Plaintiff purports to defend
5 its claims under Section 11 of the Securities Act, but Plaintiff's Opposition does
6 nothing to address the fatal pleading defects described in the Underwriter
7 Defendants' Motion.

8 Plaintiff admits, as it must, that it did not purchase STEC shares "pursuant
9 to" the Secondary Offering. As a result, Plaintiff has standing under Section 11
10 only if it purchased STEC shares that can be "traced" back to the Secondary
11 Offering. At the motion to dismiss stage, in order to raise its "right to relief above
12 the speculative level," this requires Plaintiff to allege *how* it will trace its shares.
13 Plaintiff does not even attempt to meet this requirement, and therefore has failed to
14 allege any basis for standing to pursue Section 11 claims. This failure, by itself,
15 requires Plaintiff's Section 11 claims to be dismissed.

16 Separately, Plaintiff has also failed to plead its Section 11 claims with the
17 required particularity. As this Court has ruled, Plaintiff's Section 11 claims against
18 the Underwriter Defendants are subject to the heightened pleading requirements of
19 Rule 9(b). Although Plaintiff continues to argue that Rule 9(b) should not apply,
20 Plaintiff offers no new arguments or authorities that would undermine the Court's
21 prior ruling. Moreover, as detailed by the STEC Defendants, Plaintiff has failed to
22 satisfy Rule 9(b)'s heightened pleading requirements. As a result, all of Plaintiff's
23 claims against the Underwriter Defendants should be dismissed with prejudice.

24 **II. ARGUMENT**

25 **A. Plaintiff's Securities Act Claims Fail For Lack of Standing**

26 **1. Plaintiff's Conclusory "Tracing" Allegations Do Not S suffice**

27 Plaintiff's conclusory allegation that Representative Plaintiff Norfolk
28 Country purchased shares "pursuant to or traceable to the Secondary Offering"

1 (SAC ¶¶ 24, 275) is insufficient to satisfy Plaintiff's burden to allege standing. In
2 its Opposition, Plaintiff backs away from any pretense that Norfolk County
3 actually purchased shares "pursuant to" the Secondary Offering and argues instead
4 that its conclusory allegation regarding "traceability" is sufficient at this stage of
5 the case. Plaintiff is wrong.

6 Although Plaintiff cites several cases in support of its argument that
7 conclusory allegations regarding traceability are sufficient "at the motion to
8 dismiss stage" (Opp. at 3-4), each of Plaintiff's cases was decided before the
9 Supreme Court's seminal decisions in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
10 570 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).¹ See *In re Century*
11 *Aluminum Co. Sec. Litig.*, No. C09-1001, 2011 U.S. Dist. LEXIS 21406 at *23 n.8
12 (N.D. Cal. Mar. 3, 2011) ("While plaintiffs have cited cases holding that, at the
13 pleading stage, mere allegations that shares will be traceable are sufficient to state
14 a claim in a secondary offering case, those cases were decided before *Twombly* and
15 *Iqbal*."). As the Supreme Court made clear in *Twombly*, even at the motion to
16 dismiss stage a plaintiff must provide "more than labels and conclusions, and a
17 formulaic recitation of the elements of a cause of action will not do." *Twombly*,
18 550 U.S. at 555; see also *Iqbal*, 129 S. Ct. at 1949. Rather, it is now clear that the
19 factual allegations in a complaint "must be enough to raise a right to relief *above*
20 *the speculative level[.]*" *Twombly*, 550 U.S. at 555 (emphasis added); see also
21 *Iqbal*, 129 S. Ct. at 1949 ("Where a complaint pleads facts that are merely
22 consistent with a defendant's liability, it stops short of the line between possibility
23 and plausibility of entitlement to relief.").

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26 ¹ The lone exception is *In re Metropolitan Sec. Litig.*, 532 F. Supp. 2d 1260, 1280-
27 81 (E.D. Wash. 2007), which failed to explicitly consider the impact of *Twombly*,
28 did not involve a secondary offering, and required plaintiffs to file "an amended
certification ... tracing the representative's securities to one or more of the
Registration Statements at issue" before moving for class certification.

1 “Speculat[e]” is exactly what Plaintiff asks the Court to do with respect to
2 Norfolk County’s standing to pursue Section 11 claims. Although Plaintiff
3 complains that the Oppenheimer Declaration submitted previously by the
4 Underwriter Defendants “does not … assert that the shares purchased by Norfolk
5 County … are not traceable to the [Secondary] Offering” (Opp. at 7), Plaintiff puts
6 the burden on the wrong party: “The burden of establishing … standing rests on
7 the party asserting the claim.” *Colwell v. Dept. of Health & Human Servs.*, 558
8 F.3d 1112, 1121 (9th Cir. 2009). Plaintiff has done nothing to satisfy that burden.

9 Despite Plaintiff’s attempts to confuse the issue, the Underwriter Defendants
10 do not contend that Plaintiff must prove at this stage of the case that Norfolk
11 County’s shares are “actually traceable” to the Secondary Offering. (Opp. at 4.)
12 Instead, consistent with *Century Aluminum*, the Underwriter Defendants argue only
13 that Plaintiff must establish “how [its] shares *can be* traced” to the Secondary
14 Offering. *See Century Aluminum*, 2011 U.S. Dist. LEXIS 21406 at *22 (“[T]he
15 Court has not asked plaintiffs to plead facts that prove their securities are traceable
16 to the secondary offering here, but to plead facts showing how their shares can be
17 traced.”). Such a showing is especially important here, given that (1) Plaintiff has
18 backed away from any pretense that Norfolk County actually purchased shares
19 “pursuant to” the Secondary Offering, and (2) the market already contained over
20 40 million STEC shares when the Secondary Offering’s nine million additional
21 shares were made available. *Id.* at *26-27; (STEC RJN Ex. Y at 249).

22 **2. Norfolk County’s Later Purchases From Oppenheimer Are
23 Irrelevant**

24 Plaintiff attempts to distinguish this case from *Century Aluminum* on one
25 ground: In *Century Aluminum*, “the plaintiffs purchased shares through brokers
26 and brokers’ third-parties, as opposed to through the underwriters,” while here,
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1 “Norfolk County purchased directly from Oppenheimer” on some later dates.²
2 (Opp. at 4.) This distinction, to the extent it is even accurate, is meritless.

3 Plaintiff offers no explanation for why Norfolk County’s subsequent
4 purchases of shares from Oppenheimer (as opposed to from brokers or other third
5 parties) suggests that those particular shares may be traced to the Secondary
6 Offering. (Opp. at 6.) Rather, Plaintiff asks the Court to assume – without any
7 basis – that, because Oppenheimer was one of several underwriters for the
8 Secondary Offering, any shares that Oppenheimer sold on some *later dates* can be
9 traced to that offering.³ This argument is wildly speculative and fails to
10 demonstrate *how* Plaintiff will trace any shares that Norfolk County purportedly
11 purchased back to the particular shares that were sold in the Secondary Offering.
12 *Century Aluminum*, 2011 U.S. Dist. LEXIS 21406 at *22. Accordingly, Plaintiff
13 has failed to plead sufficient facts to establish Norfolk County’s standing to pursue
14 Section 11 claims, and those claims must be dismissed. *Id.* at 26-27; *Grand Lodge*
15 *of Pa. v. Peters*, 550 F. Supp. 2d 1363, 1376 (M.D. Fla. 2008) (“Lead Plaintiffs
16 have not suggested what evidence they intend to use to show that the particular
17 shares … can be traced to the stocks issued in the [offering]. Thus, the Court finds
18 that, in this case, Lead Plaintiffs have not sufficiently alleged that the [] stocks
19 purchased are traceable to the [] offering.... [T]he Court grants the motions to
20 dismiss the claims brought pursuant to Section 11.”).

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24 ² The declaration and exhibits submitted by Plaintiff do not even support this point.
25 Rather, they make clear that “Copper Rock,” an “investment manager,” purchased
the shares at issue. (See Motch Decl. at ¶¶ 1-2.)

26 ³ Plaintiff provides absolutely no basis to cast any doubt on the statement in the
27 Declaration of Deborah Baker that “[a]ll sales of stock by Oppenheimer in the
Secondary Offering were allocated to purchasers on August 6, 2009” and “took
28 place at the offer price of \$31 per share.” (See Baker Decl. ¶ 4.)

1 **B. Plaintiff's Securities Act Claims Fail Because They Do Not Plead**
2 **The Existence of Any False Statement With Particularity**

3 **1. Rule 9(b)'s Heightened Pleading Standards Apply To The**
4 **Entire Second Amended Complaint, And All Defendants**

6 This Court previously ruled that the heightened pleading requirements of
7 Rule 9(b) apply to “the [Complaint] as a whole” including Plaintiff’s Section 11
8 claims “against the Underwriter Defendants because the [complaint] alleges a
9 unified course of fraudulent conduct.” (Order at 4 n.1.) Ignoring that ruling,
10 Plaintiff continues to argue that Rule 9(b) should not apply. In doing so, Plaintiff
11 offers no compelling authority or arguments that suggest the Court got it wrong
12 last time. Instead, Plaintiff relies entirely on two cases decided before the Ninth
13 Circuit made clear in *Rubke v. Capital Bancorp Ltd.*, 551 F.3d 1156, 1161 (9th Cir.
14 2009) that Rule 9(b) applies to the entire complaint where the same factual
15 allegations (i.e.. a “unified course of conduct) support both Securities Act and
16 Exchange Act claims. *See also In re Bare Escentuals, Inc. Sec. Litig.* 745 F. Supp.
17 2d 1052, 1068 (N.D. Cal. 2010). Indeed, Plaintiff does not suggest that it has
18 alleged anything other than a unified course of conduct. Instead, Plaintiff asserts
19 that the Court should reverse course because “the Section 11 claims against the
20 Underwriter Defendants are [now] alleged in a separate count not alleged against
21 any other Defendant.” (Opp. at 9.) This argument is meritless.

22 Plaintiff’s argument relies on the language in the Court’s Order stating that
23 Rule 9(b) applied to the Section 11 claims against the Underwriter Defendants
24 because, “among other reasons, ‘the claims against the Underwriter Defendants
25 [were] not differentiated from the claims against the other Defendants.’” (Opp. at
26 9) (quoting Order at 4 n.1.) But Plaintiff’s assertion that its pleading defect may be
27 cured simply by pleading Section 11 claims in separate causes of action
28 demonstrates a complete misunderstanding of the governing law and the Court’s

1 statement.

2 As the Ninth Circuit has made clear, “[w]here as here, ... a complaint
3 employs the exact same factual allegations to allege violations of section 11 as it
4 uses to allege fraudulent conduct under section 10(b) of the Exchange Act, we can
5 assume that it sounds in fraud” and Rule 9(b) therefore applies to the complaint as
6 a whole. *Rubke v. Capitol Bancorp Ltd.*, 551 F. 3d 1156, 1161 (9th Cir. 2009) (See
7 also Order at 4 n.1) (Rule “9(b) applies to the [complaint] as a whole[.]”)⁴
8 Plaintiff’s decision to now plead its Section 11 claims against the Underwriter
9 Defendants as a separate cause of action does absolutely nothing to “differentiate”
10 those claims. Indeed, as described in the Underwriter Defendants’ Motion to
11 Dismiss, the same factual allegations *still* explicitly support *all* of the Exchange
12 Act and Securities Act causes of action in the SAC. (See Mot. at 11-12.) Although
13 the Section 11 claim against the Underwriter Defendants is alleged as a separate
14 cause of action, it expressly incorporates the allegations contained in Section IV of
15 the SAC entitled “Factual Background And Substantive Allegations Relating To
16 The Exchange Act Claims” and the allegations contained in Section V of the SAC
17 entitled “Additional Allegations Of Scienter.” (See SAC at ¶ 34). Accordingly, the
18 heightened pleading requirements of Rule 9(b) clearly apply to Plaintiff’s Section
19 11 claims against the Underwriter Defendants.

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24 ⁴ The Court’s Order is in line with those of other district courts sitting in California
25 since *Rubke*, which have consistently applied Rule 9(b) to the entire complaint, and
to all defendants, where the same facts underlie both fraud and non-fraud claims.
26 *See, e.g., Ferrington v. McAfee, Inc.*, 2010 WL 3910169 at *5 (N.D. Cal., October
10, 2010) (quoting *Rubke* and applying Rule 9(b) to all claims, including non-fraud
claims); *In re Bare Escentuals, Inc. Sec. Litig.*, 2010 WL 3893622 at *13 (N.D.
Cal. Sept. 30, 2010) (same); *Salameh v. Tarsadia Hotels*, 2010 WL 2839013 at *8
(S.D. Cal. July 20, 2010) (same).

2. Plaintiff Fails To Plead Its Section 11 Claims With The Required Particularity

3 Rule 9(b) requires Plaintiff to “state with particularity the circumstances
4 constituting fraud” Fed. R. Civ. P. Rule 9(b). “In other words, the [SAC]
5 must set forth what is false or misleading about a statement, and why it is false.”
6 *Rubke*, 551 F.3d at 1161 (quotation omitted). As detailed by STEC in its motion to
7 dismiss, Plaintiff has failed completely to meet this burden. (See STEC Mot. at 27-
8 28.) The Underwriter Defendants will not repeat those arguments here, but rather
9 incorporate them by reference.

10 Accordingly, for the reasons set forth in STEC's motion to dismiss, even
11 setting aside Plaintiff's lack of standing to assert Section 11 claims, those claims
12 must be dismissed for the additional reason that Plaintiff has failed to plead those
13 claims with the required particularity.

14 | III. Conclusion

15 For the foregoing reasons, the Underwriter Defendants respectfully request
16 that the Court dismiss all of the remaining claims against them with prejudice.

18 | Dated: May 16, 2011

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